(16)

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. [redacted] 116

NIESCHLAG & CO., INC.,

Petitioner,

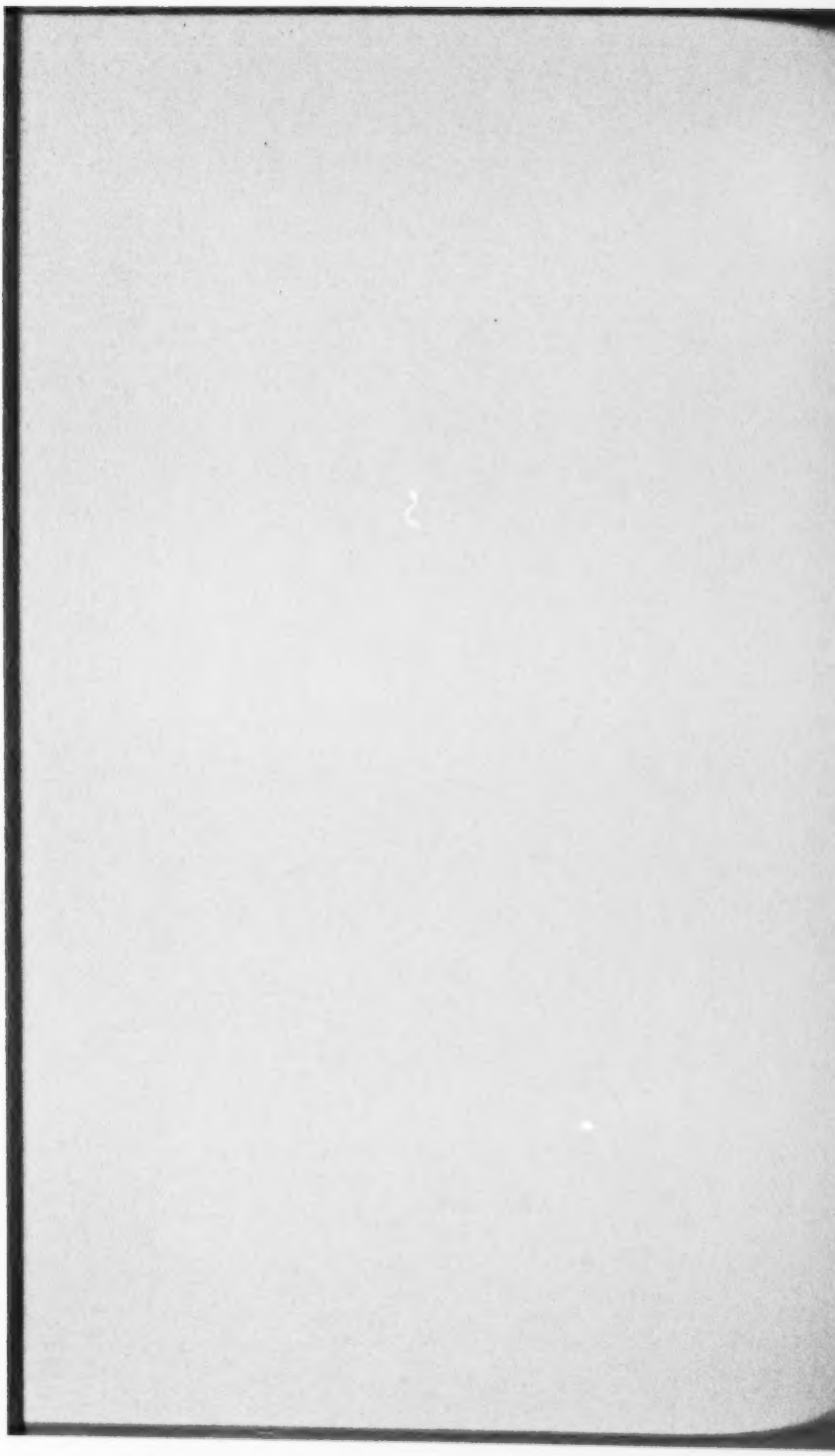
against

ATLANTIC MUTUAL INSURANCE COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. M. RICHARDSON LYETH,
MARK W. MACLAY,
Counsel for Respondent.



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OCTOBER TERM 1941

No. 1281

NIESCHLAG & CO., INC.,
Petitioner,
against
ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The *per curiam* opinion of the Circuit Court of Appeals affirming the judgment of the District Court on the opinion below (R. 161) is reported in 126 F. (2d) 834.

The opinion of the District Court (R. 145) is reported in 43 F. Supp. 797.

Jurisdiction

The opinion of the Circuit Court of Appeals was rendered February 14, 1942 (R. 161). A petition for rehearing was filed by petitioner with said court on Feb-

ruary 28, 1942 (R. 162) and said petition for rehearing was denied and the order of denial entered March 5, 1942 (R. 180, 181). The judgment of said court and the order for the mandate thereon was entered March 7, 1942 (R. 183).

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by Act of Congress of February 13, 1925 (U. S. Code, Title 28, Section 347(a)).

Statement

This action at law is upon an open marine insurance policy on goods issued in the name of Garcia Sugars Corporation and/or as Agents (R. 46) and certificates of insurance in the same name issued thereunder which insured bags of cocoa beans of specified marks and numbers located in a certain warehouse (R. 61-75). Petitioner demanded a jury trial.

Respondent moved before the District Court for the Southern District of New York under Rule 56 of the Federal Rules of Civil Procedure for summary judgment in its favor upon the complaint, the amended answer and various affidavits annexed to the moving papers (R. 94). Thereupon petitioner, by cross-motion upon the same pleadings and upon certain affidavits which were submitted both in support of the cross-motion and in opposition to respondent's motion, likewise moved under the same rule for summary judgment in its favor (R. 112). The District Court (Bondy, J.) granted respondent's motion for summary judgment and denied petitioner's cross-motion (R. 152). The Circuit Court of Appeals

for the Second Circuit in a *per curiam* decision affirmed on the opinion below (R. 161).

The insurance certificates specified as the risks insured against, in addition to fire, lightning and sprinkler leakage, the following:

> "* * * risks, under uniform standard extended coverage endorsement No. 4 (Perils of windstorm, cyclone, tornado and hail, explosion, riot, riot attending a strike, aircraft, smoke, vehicles), also to insure notwithstanding any exclusion in said endorsement, damage by rain and/or other water, improper stowage and/or other cargo (but excluding vermin damage) theft of entire bags and/or non-delivery, all irrespective of percentage" (R. 65, 69-73).

The descriptive marks and numbers in the insurance certificates corresponded to the descriptive marks and numbers of bags of cocoa beans set forth in warehouse receipts issued by the warehouseman to Garcia Sugars Corporation (hereinafter called "Garcia" (R. 61-64, 69-75; 35-45).

Petitioner on various dates loaned money to Garcia under agreements in writing whereby, among other things, Garcia agreed to assign and transfer to the petitioner, duly endorsed in blank, negotiable warehouse receipts "representing * * * bags of various grades of cocoa beans, now owned by Garcia, as collateral security for the advances" (R. 27, 30, 34), and further agreed to fully insure the said "bags of cocoa beans herein pledged against loss by fire, theft, shipwreck, casualty, or otherwise", and agreed to deliver insurance policies covering any such loss (R. 29, 30, 32, 34). The warehouse receipts were pledged with and the insurance certificates transferred to petitioner by Garcia pursuant to those

agreements. Neither the loan agreements nor the warehouse receipts were mentioned in the marine policy or the insurance certificates and were never shown to the respondent (R. 103). Both the warehouseman and Garcia subsequently went into bankruptcy (R. 24, 25).

In fact there never were any such cocoa beans. The warehouse receipts were fraudulent and neither Garcia nor petitioner had any title to any bags of cocoa beans of such marks and numbers in the warehouse (R. 93). Petitioner did have title to certain other bags of cocoa beans not involved in this action, which it recovered (R. 93).

The defense pleaded, *inter alia,* was lack of insurable interest (R. 83).

Petitioner argued that the inclusion of the words "non-delivery" in the above quoted clause in the certificates had the effect of converting the insurance into a surety bond guaranteeing the performance of the warehouseman's obligation to deliver under the warehouse receipts; in other words, converting insurance of physical objects assumed by both parties to exist into a guaranty of documents.

Questions Presented

I. Whether the courts below correctly applied the law of New York in holding that a person having no insurable interest in goods insured against loss or damage under a marine policy and certificates issued thereunder cannot recover thereon.

II. Whether the courts below correctly held that upon the record before them there was no issue of fact to go

to the jury as to whether the insurance under the open marine policy and certificates issued thereunder upon cocoa beans against specified risks, including "theft of entire bags and/or non-delivery", can, by the inclusion therein of the words "and/or non-delivery", be converted into a guaranty bond guaranteeing the performance of the warehouseman's obligation to deliver under warehouse receipts issued by the warehouseman.

Argument

I

The courts below correctly applied the law of New York in holding that a person having no insurable interest in goods insured against loss or damage under a marine policy and certificates issued thereunder cannot recover thereon.

Petitioner asserts as one of the reasons for granting this writ that the courts below have decided important questions of local New York law and rights thereunder probably in conflict with applicable local decisions. On the contrary, the New York law is clear and the District Court in its opinion specifically relied upon the following decision of the New York Appellate Division and the New York statute that a person having no insurable interest in the subject matter of insurance upon goods or property against loss or damage cannot recover under a policy of insurance. *Miller* v. *Stuyvesant Insurance Co.*, 223 App. Div. 6 (1st Dept., 1928); *New York Insurance*

Law, §148.* Petitioner cites no cases contrary to or distinguishing these authorities.

Petitioner completely ignores the law as thus clearly enunciated and argues before this Court, not that it had any insurable interest in the cocoa beans, but that the courts below could not have found that it had no insurable interest upon cross-motions for summary judgment. The complaint did not allege any interest of the petitioner in the cocoa beans as is necessary under the New York law, as above pointed out, and therefore the complaint did not state a cause of action. Furthermore, the amended answer specifically alleged the lack of any insurable interest (R. 81-84), and, in addition, there was annexed to such answer an order entered in the reclamation proceeding in the warehouseman's bankruptcy proceeding in which it was held that petitioner was not the owner of or entitled to the possession of any bags of cocoa beans in the warehouse (except for certain other bags previously awarded to petitioner and not involved in this action) (R. 91). In the reclamation proceeding petitioner had sought to recover the cocoa beans referred to in the identical warehouse receipts alleged in this action.

There is not a suggestion in petitioner's complaint or in the affidavits submitted on its motion for summary judgment that petitioner had any title or interest in the cocoa beans. Petitioner's failure to plead or offer any proof of insurable interest would compel dismissal of the complaint even without reference to the order in the reclamation proceeding.

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* Appendix A.

II

The courts below correctly held that upon the record before them there was no issue of fact to go to the jury as to whether the insurance under the open marine policy and certificates issued thereunder upon cocoa beans against the specified risks, including "theft of entire bags and/or non-delivery", can, by the inclusion therein of the words "and/or non-delivery", be converted into a guaranty bond guaranteeing the performance of the warehouseman's obligation to deliver under warehouse receipts issued by the warehouseman.

Petitioner argues that the insurance here sued upon was a guaranty of the warehouse receipts and of the warehouseman's obligation to deliver thereunder. The basis for this argument is the inclusion of the words "and/or non-delivery" in the risks clause of the certificates. Its objection to the decision of the courts below to the contrary seems to be that the matter couldn't have been disposed of upon the cross-motions for summary judgment since the petitioner had demanded a jury trial. It argues that either judgment in favor of the petitioner should have been entered or the matter submitted to a jury, but that judgment in favor of the respondent upon its motion in some way deprives petitioner of a jury trial.

The fact is, as a reading of the record will indicate, there was no genuine issue as to any material fact. Therefore, in accordance with the provisions of Rule 56 of the Rules of Civil Procedure, the courts below were correct in granting judgment for respondent as a question of law.

Petitioner cites no case in which an insurance on goods against risks, including theft and non-delivery, has been held a guaranty of documents. It claims that the decision herein conflicts with various cited cases involving suits on bonds issued by a guaranty company guaranteeing the performance of contracts. It is submitted that the difference between insurance on property against loss and insurance guaranteeing the performance of contracts, viz., the difference between property insurance and guaranty and fidelity insurance, is so fundamental as not to require extended comment. In fact, under the statutes of New York the writing of guaranty bonds is confined solely to surety and casualty companies and is expressly prohibited to marine companies. See *New York Insurance Law*, §§ 310, 46.* Respondent, a fire and marine company, is prohibited by these provisions, and by its charter, from writing guaranty bonds.

Petitioner argues, however, that in spite of its having moved for summary judgment upon the pleadings and affidavits, the courts below could not have determined the question in favor of the respondent on its motion, but that the various inferences stressed in the petition should have been referred to a jury as to meaning, intent and purpose of the inclusion of the words "and/or non-delivery". In other words, petitioner claims that the District Court, so long as it would not grant petitioner's motion for summary judgment, should have denied both motions.

In denying petitioner's motion, the District Court, after a careful review of the entire record, held that there was no issue of fact presented and that respondent was entitled to judgment as a matter of law. The Circuit Court of

* Appendix B.

Appeals, likewise after a review of the same record, came to the same conclusion. If a triable issue of fact had been presented, both motions would have been denied.

Thus petitioner's argument really is that the record presents a triable issue of fact. Even though, in the last analysis, this may be a question of law, it cannot be seriously argued that it is a question of such general interest and importance as to justify this Court's granting certiorari, for the purpose of reviewing the record to determine whether any material question of fact was presented.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated, New York July 15, 1942.

Respectfully submitted,

J. M. Richardson Lyeth,
Mark W. Maclay,
Counsel for Respondent.